For reasons already stated earlier, we hold that the learned trial Judge was correct in dismissing the Motion. The appeal is accordingly dismissed with costs. Deposit to the first respondent to account for taxed costs.

Appeal dismissed.

Solicitors : *Skrine & Co.; K. Chandra & Co.*

NG YEE FONG & ANOR. v. E.W. TALALLA

[S.C. (Salleh Abas L.P., Seah & Mohamed Azmi S.C.JJ.) May 23 & June 28, 1985]

[Kuala Lumpur – Federal Court Civil Appeal No. 230 of 1984]

Equity – Encroachment on land – Application for mandatory injunction to remove encroachment – Equitable estoppel – Estoppel by acquiescence – Discretion – Laches.

Land Law – Encroachment on land – Right of proprietor – Injunction – National Land Code, ss. 340 & 341.

In this case the respondent had applied for and obtained a mandatory injunction to remove the septic tank and fence which formed part of the appellants' premises but which had been constructed on the respondent's land. The appellant appealed. It was contended that the septic tank and the other encroachment had a right to be on the land and as such the defence of equitable estoppel would apply.

Held: (1) a proprietor who establishes a proprietary right is *ex debito justitiae* entitled to an injunction unless it can be said against him that he has raised such an equity that it is no longer open to him to assert his legal or proprietary title;

(2) in the circumstances of this case no equity had in fact been raised against the respondent. From the evidence the appellants had not satisfied any of the requisite elements so as to enable them to raise the defence of equitable estoppel;

(3) in this case the damage was not trivial in nature and could not be remedied by compensation in damages. The encroachment particularly the septic tank adversely interfered with the use of the respondent of his land for the purpose of building a dwelling house. As such the learned judge had properly exercised his discretion to grant the injunctions.

(4) in the circumstances of this case the respondent cannot possibly be held to be guilty of laches so as to disentitle him from the remedy of injunction which he sought.

Cases referred to:

(1) *Central London Property Trust Ltd.* v. *High Trees House Ltd.* [1947] K.B 130.
(2) *De Bussche* v. *Alt* (1878) 8 Ch. D. 286, 314.
(3) *Armstrong* v. *Sheppard & Short Ltd.* [1959] 2 All E.R. 651.

SUPREME COURT.

Miss G. Ambiavagar for the appellants.
T. Ariarajah for the respondent.

Cur. Adv. Vult.

Mohamed Azmi S.C.J. (delivering the Judgment of the Court) : This is an appeal against the judgment of Wan Hamzah J. (as he then was) wherein he granted the following orders with costs in favour of the respondent:

(i) that the Defendants should forthwith cease from encroaching into the Plaintiff's land and resite their fencing in accordance with the boundary as shown in the title;

(ii) that the Defendants should remove their septic tank from the Plaintiff's land;

(iii) that the Defendants should refrain whether by themselves or their servants or agents or otherwise from doing the following acts or any of them that is to say erecting or re-erecting buildings on their land in such a manner as to encroach onto the Plaintiff's land.

The learned Judge also dismissed the appellants' counterclaim for mandatory injunction pertaining to a garage built by the respondent against which there is no appeal.

From the pleadings, the respondent's cause of action was based on trespass to land – the dispute being one of encroachment of respondent's land. However, from the respondent's Amended Statement of Claim, it was his case that the trespass, *i.e.*, the construction of the septic tank and fence was not carried out by the appellants but by their predecessors-in-title. As such he did not pray for damages for trespass but merely for the removal by the appellants of the encroachment from his land. It should therefore be noted at the outset that the dispute was not on the construction of the encroachment but rather on the right of the respondent as the sole registered proprietor of lot 179 to have the septic tank and fence (which formed part of the appellants' premises) removed from the land by mandatory injunction. As a matter of law, it cannot be disputed that a proprietor who establishes a proprietary right is *ex debito justitiae* entitled to an injunction unless it

can be said against him that he has raised such an equity that it is no longer open to him to assert his legal or proprietary title. Further as stated at page 30 in *Kerr* on Injunctions (6th edition):

"After the establishment of his legal right and of the fact of its violation, a plaintiff is in general entitled as of course to a perpetual injunction to prevent the recurrence of the wrong unless there be something special in the circumstances of the case, such as laches or where the interference with the plaintiff's right is trivial."

The onus is therefore on the appellants to establish that there is something special in the circumstances of the present case why the learned trial Judge ought not to have granted the injunction in favour of the respondent. Both here and in the court below it is not seriously in dispute that the respondent was at all material times the registered owner of a vacant piece of land held under lot 179, section 98, town of Kuala Lumpur, whilst the appellants were the co-owners of the adjacent lot No. 126 with a dwelling house thereon known as House No. 75A, Jalan Penghulu Mat, Kuala Lumpur. Prior to April 22, 1955, both lots 126 and 179 were part and parcel of a bigger piece of land comprised in lot No. 1411 (hereinafter referred to as the "parent lot") which was owned by the plaintiff's mother Alice Talalla as representative of the estate of Mr. Hewage Sarnalis Talalla (deceased). On her application, the parent lot was subdivided into 7 lots known as lot Nos. 125 - 131 as shown in the plan at page 107 of Appeal Record. Some time before 1953, *i.e.*, well before the subdivision Alice Talalla had by a deed of sale sold an undivided portion of the parent lot to one Madam Loke Mooi who was responsible for putting up House No. 75A together with the fence and septic tank in January 1955. When the parent lot was surveyed and subdivided, the undivided portion sold to Loke Mooi was finally identified as lot 126 which was then transferred and registered in her name on June 13, 1955, but unfortunately it became clear now that part of the house, the fence and the septic tank had in fact been sited on the adjacent lot No. 179 which was the product of a further subdivision in 1958 of lot 127 transferred by Alice Talalla to the respondent in consideration of love and affection on August 20, 1956. In the meantime, lot 126 with the house thereon had passed through many hands by purchase and it was on February 6, 1975 that the present appellants became the sixth owners when they bought the property from Malayan Finance Corporation for the sum of $60,000/- *vide* Sale and Purchase Agreement dated December 27, 1974 (see Exhibit D8 at page 96 of Appeal Record). There was no dispute on the fact of encroachment nor on the fact that the encroachment was committed before the parent lot was subdivided. By the respondent's solicitors' letter dated May 28, 1975, the appellants were requested to pull down portion of the house which had been encroaching onto the respondent's land and also to remove the entire fence and septic tank. In the court below the appellants put up two defences. First, they pleaded that the respondent's claim was time-barred by virtue of section 9(1) Limitation Ordinance 1953, and secondly they claimed equitable estoppel as a defence. The learned trial Judge rejected the defence of limitation by virtue of section 341 National Land Code which excludes the application of Limitation Ordinance in the case of adverse possession. This defence is not pursued before us and we think it is rightly abandoned since the respondent's cause of action was not based on recovery of land but on his right to assert his legal and proprietary title. The second defence was treated by the learned Judge as tantamount to a claim for right of easement and he rejected the defence on the ground that there was no evidence of an express grant of such right as required by sections 284 and 286 of the National Land Code. In our view the second defence was not really based on right of easement. From the evidence and submissions, what in fact was being contended was that the encroachment on lot 179 was not unlawful because the septic tank and the other encroachment had the right to be there, and as such the defence of equitable estoppel would apply. The encroachment was not in fact caused by the appellants or any of the predecessors-in-title. It occurred as a result of the haphazard way in which the parent lot had been subdivided in 1955. Before us the main thrust of the argument put forward by the appellants is that although the encroachment was admitted the learned Judge was wrong in granting the orders of injunction. There could be no trespass, so they argued, because the appellants' septic tank, the fence and part of the house had a right to be on respondent's land. But in truth, there are only two material questions to be considered in this appeal. First, what was the equity that had been raised against the respondent so as to debar him from asserting his proprietary right in the land? Secondly, if no equity had been so raised, what were the special circumstances in this particular case which the learned Judge had failed to consider in exercising his discretion in granting the injunctions?

On the first question, in *Central London Property Trust Ltd.* v. *High Trees House Ltd.*[1] it was held that the plaintiff company had made a

promise that was intended to create legal relations, was to the knowledge of the promisor to be acted upon by the promisee, and was in fact so acted upon by the promisee and that the plaintiff company was accordingly bound to honour its promise. From the submission of Miss Ambiavagar for the appellants, the equitable remedy being claimed was not based on promissory estoppel but on estoppel by acquiescence which is equitable in nature. The term "acquiescence" is used where a person refrains from seeking redress when there is brought to his notice a violation of his right of which he did not know at the time, and in that sense acquiescence is an element in laches. The term is however properly used where a person having a right, and seeing another person about to commit or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed; a person so standing by cannot afterwards be heard to complain of the act (see *De Bussche* v. *Alt*[2]). In that sense the doctrine of acquiescence may be defined as acquiescence under such circumstances that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct, the principle of estoppel by representation applying both at law and in equity, although its application to acquiescence is equitable. On the facts of the instant case, particularly the sheer impossibility of the respondent being responsible for or in any way connected with inducing or making representation to Madam Loke Mooi to construct the house with septic tank in 1955 before the parent lot was subdivided, and the absence of any acceptable evidence that it was the respondent who had induced the appellants by acquiescence or otherwise to purchase the property from Malayan Finance, we fail to understand how it could be said against the respondent that he had raised an equity by acquiescence so as to prevent him from asserting his legal and proprietary rights on lot 179, and estop him from making a claim against the appellants for the removal of the encroachment. To allow the encroachment to continue would definitely be a violation of the respondent's proprietary right. There was no acquiescence on his part either in the construction of the septic tank and fence or in allowing the encroachment to continue from the time he became aware of the violation. In fact in her written submission in the court below Miss Ambiavagar had cited paragraph 1474, Vol. 16 *Halsbury's* Laws of England, 4th edition, as authority to support her contention that the respondent had acquiesced to the state of affairs and was estopped from making the claim against the appellants. Paragraph 1474 on the subject of "Elements in the Estoppel" states:

> "When A stands by while his right is being infringed by B the following circumstances must as a general rule be present in order that the estoppel may be raised against A: (1) B must be mistaken as to his own legal rights; if he is aware that he is infringing the rights of another, he takes the risk of those rights being asserted; (2) B must expend money, or do some act, on the faith of his mistaken belief; otherwise, he does not suffer by A's subsequent assertion of his rights; (3) acquiescence is founded on conduct with a knowledge of one's legal rights, and hence A must know of his own rights; (4) A must know of B's mistaken belief; with that knowledge it is inequitable for him to keep silence and allow B to proceed on his mistake; (5) A must encourage B in his expenditure of money or other act, either directly or by abstaining from asserting his legal right."

From the evidence we are satisfied that the appellants had not satisfied any of these elements so as to enable them to raise the defence of equitable estoppel. Even on the first element, it could not be said that by having their septic tank, the fence and part of the house on respondent's land, the appellants were unaware that they were infringing the rights of the respondent as proprietor of the adjacent lot 179. The indefeasibility of title and interest as provided in section 340 and the effect of adverse possession as regards title or interest in the land under section 341 of the National Land Code are clear statutory provisions which the appellants cannot ignore. Secondly, by the sale and purchase agreement dated December 27, 1974, the appellants clearly had actual notice at the time of purchase of the property from Malayan Finance that they accepted the risk of the respondent exercising his right to have the encroachment removed. Under preambles to the agreement, the Malayan Finance agreed to sell and appellants had agreed to purchase lot 126 together with the building erected thereon subject to the encumbrances as set out under clause 5 (see page 97 of Appeal Record). This is repeated in clause 1 which also stipulated the purchase price at $60,000 – a price which we think was comparatively cheap for property in Kuala Lumpur even in 1974, and that we must say it was a fair price having regard to the encumbrances in clauses 5 and 6 which were in the following terms:

> "5. The said Property is sold subject to the following encumbrances:-
>
> (a) the encroachment of the boundary of the said Land upon the adjoining Lot 179 (hereinafter referred to as "the adjoining Lot");

(b) a portion of the said Building is situated upon the adjoining Lot;

(c) the existing septic tank for the said Building is situated within the adjoining Lot;

(d) infringement of by-law 45(a) of the Kuala Lumpur Municipal (Building) By-Laws in that the siting of the said Building from the boundaries of the said Land is less than 7 feet 6 inches.

6. The Purchasers hereby confirm and declare as follows:-

(a) that full disclosures have been made to them by the Vendor on all the facts relating to the encumbrances set out under Clause 5 above;

(b) that they have purchased the said Property in the state in which it now is with full notice of all the aforesaid encumbrances and facts relating thereto and without any reservations whatsoever;

(c) that no claim shall lie nor shall any action or proceedings be commenced against the Vendor for any loss damages expenses or costs incurred or suffered by the Purchasers arising out of or in any way connected with the aforesaid encumbrances;

(d) to indemnify and keep indemnified the Vendor against all claims loss damages fines expenses or costs suffered or incurred by the Vendor arising out of or resulting from any claims actions proceedings or prosecutions initiated or instituted against the Vendor by any person or persons in respect of the aforesaid encumbrances."

In this appeal the sale agreement made between the appellants and Malayan Finance Corporation clearly supports the inescapable conclusion that appellants recognised and accepted the encumbrances as set out in Clause 5 apart from agreeing to indemnify Malayan Finance of any liability that the Corporation might incur arising from such encumbrances. In short, the appellants had purchased lot 126 with actual knowledge of the encroachment on lot 179 which was a violation of the respondent's right. It was not as a result of any representation or conduct on the respondent's part. He had nothing to do with the sale transaction between Malayan Finance and the appellants. In view of the admission in the sale and purchase agreement, the appellants could not now contend that they had bought the property unencumbered. It was an undeniable fact that they had bought the property coupled with a risk of removing the septic tank, the fence and part of the house which had encroached on lot 179, when required to do so by the owner of that adjacent lot. In the circumstances, although the learned Judge was wrong in treating the defence of equitable estoppel on the basis of a claim for a right of easement, we hold that no equity had in fact been raised against the respondent. It was further argued that the appellants were not barred from applying the defence of estoppel because they had bought the property only after having sight of the letter Exhibit D7 written to Messrs. Shook Lin & Bok, solicitors for Malayan Finance by City Hall in which they confirmed the fact that no action would be taken on the encroachment (see page 95 Appeal Record). It was also alleged that in coming to that decision, City Hall had interviewed the respondent. We are unable to understand how an administrative undertaking by the City Hall not to take action against Malayan Finance to demolish the house for non-compliance with the building by-laws can be attributed as a representation by the respondent to waive his legal right as a registered proprietor of lot 179 and estop him from taking action against the appellants. There was not an iota of evidence that the respondent had made a representation to that effect either by words or conduct to the appellants. A representation or promise by a third party to the appellants' predecessors-in-title cannot possibly bind the respondent. Even assuming for a moment that the respondent had made a representation to City Hall, the appellants could not take advantage of it because no stranger to the representation can take advantage of, or become liable to, an estoppel founded thereon. This principle has at times been erroneously referred to as a requirement of mutuality or reciprocity in estoppel (see page 121. *Spencer Bower & Turner*, The Law Relating to Estoppel by Representation 2nd edition). We therefore think that this particular argument is devoid of any merit for the purpose of establishing the defence of estoppel.

On the second question, the case of *Armstrong* v. *Sheppard & Short Ltd.*[3] has been referred to us as authority for the proposition that the injunctions ought not to have been granted by the learned Judge. But we are of the view that that authority cannot assist the appellants. The facts in *Armstrong* case were entirely different. There injunction was refused because the damage caused to the plaintiff's land was trivial and also because the plaintiff had attempted to mislead the court by totally denying that he had ever intimated to the defendants that he had no objection to the construction of the sewer. Thus at page 656 Lord Evershed. M.R. had this to say:

"Secondly, it is true to say that if a man having a proprietary right proves an infringement of that right, prima facie he is entitled to an injunction: but that needs some qualification. It is not a matter of unqualified right; and one ground for denying an injunction would be that the wrong done is, in the circumstances, trivial. That proposition is founded on *Imperial Gas Light & Coke Co.* (Directors, etc.) v. *Broadbent* ((1859) 7 H.L. Cas. 600)"

Further down the page His Lordship added:

"But there were other good grounds, and formidable grounds (as I think) for refusing the plaintiff an injunction. That he misled the defendants is beyond a peradventure. It is no less clear that he attempted to mislead the court. He asserted – contrary to the fact – that he had never had any conversation with the defendants about the matter at all; and in his evidence-in-chief he so swore, untruly. It is not, therefore, at all surprising that the learned judge came to the conclusion that he should grant no equitable relief; and, in my judgment, on the facts of this case he was well entitled to take that view".

Whereas in the instant case the damage was not trivial in nature and could not be remedied by compensation in damages. The encroachment particularly the septic tank adversely interfered with the use by the respondent of his land for the purpose of building a dwelling house. As such the discretion to grant the injunctions by the learned Judge had been properly exercised.

Is there something special in the circumstances of the present appeal to deprive the respondent from the remedy of perpetual injunction to prevent the continued violation of his legal and proprietary rights? We think there is none except for the alleged delay in initiating proceedings against the appellants. In this respect, we agree with Miss Ambiavagar that the respondent must have known or ought to have known about the encroachment in 1970 when he planned erecting his own house on lot 179. We cannot accept any suggestion that the respondent was not aware of the encroachment until early 1971 when he raised it with Malayan Finance by letter dated March 25, 1971 (Exhibit P2). The letter reads as follows:

"The Manager,
Malayan Finance Co.,
16-18 Medan Pasar,
Kuala Lumpur

Dear Sir,

House No. 75A Lorong Penghulu Mat
Encroachment on lot 179
Owner E.W. Talalla

I am constructing a house just behind the above premises and observe that the rear portion has encroached on my lot to the extent of about ten feet along the entire length.

Kindly arrange to resite your septic tank and extension early as I wish to erect a garage and fence.

I shall be pleased if we could come to an amicable settlement and let me know your intention early.

Yours faithfully,

Sgd. E.W. TALALLA."

In our view the letter was worded in such polite tone that it could not be said to have come from a landowner who was completely taken by surprise of the encroachment. It is true the writ was filed in October 1977, about 2½ years after the letter dated May 28, 1975 was written by respondent's solicitors requesting the appellants to remove the encroachment. But the fact remains, the respondent never gave his assent either expressly or impliedly to the continued existence of the septic tank and the fence on his land ever since he became aware of it in 1970. The appellants became registered proprietors of the property only on February 6, 1975 and in less than four months they were already notified by letter to have the encroachment removed. In the circumstances, the respondent cannot possibly be held to be guilty of laches so as to disentitle him from the remedy of injunction that he had sought.

For the above reasons we would dismiss this appeal with costs. The deposit should be paid to the respondent to account of the taxed costs.

Appeal dismissed.

Solicitors : *Ambiavagar & Co.; T. Ariarajah.*

NAM BEE RUBBER ESTATE SDN. BHD. v. SYARIKAT TANAMAN PERAK BHD.

[S.C. (Hashim Yeop A. Sani, Syed Agil Barakbah & Wan Hamzah S.C. JJ.) February 28 & June 29, 1985]

[Kuala Lumpur – Federal Court Civil Appeal No. 246 of 1984]

Contract – Contract to clear land for the purpose of developing it as oil palm estate – Date of commencement and date of expiry.

In this case the appellant had undertaken to construct a road and drainage system on the land belonging to the respondent and to clear the land of its timber for the purpose of developing it as an oil palm estate. The agreement was terminated by the respondent. The appellant claimed that the termination of the agreement was unjustifiable and was in breach of the express or implied terms of the contract. The main question at issue was the actual time when the contract started to run. It was argued for the respondent that the period started from the date of the agreement that is August 5, 1974. On behalf of the appellant it was argued that the agreement started on August 1, 1977 when the timber licence was issued. The learned trial judge dismissed the claim of the appellant who then appealed.